IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 453

JOHN McMILLEN GREGG,

Petitioner,

v.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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CASE AUTHORITY

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In the petition for certiorari which was filed in this cause, there were two questions presented and certiorari was granted as to the first which is set forth in the footnote.[1] The Order Allowing Certiorari which was filed

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[1] "Whether a convicted defendant is entitled to a new trial where the presiding judge has read his pre-sentence report prior to the end of his trial contrary to the express provisions of Rule 32(c)(1) of the Federal Rules of Criminal Procedure and there is nothing in the record to rebut any presumption of prejudice. To this question the Seventh Circuit has answered 'yes' in *Calland* v. *United States*, 371 F.2d 295, 296 (1966) while the Sixth Circuit has answered 'no' where the issue was presented in Petitioner's cause" (Petition, p. 2).

herein in no way altered the statement of the said issue.[3] The petition for certiorari in no way invoked any Constitutional provisions. Neither the Constitution nor any Constitutional phrase was mentioned in any part of the petition and the final sentence of that portion of the petition which resulted in the granting of the writ in no way, directly or indirectly, addressed itself to a constitutional question.[4] In its Memorandum in Opposition the United States likewise made no mention of the Constitution or any Constitutional provision although the possibility of a Constitutional question impliedly was suggested in the invoking of Rule 52 of the Federal Rules of Criminal Procedure (Memorandum in Opposition, p. 4).

Consistent with the position originally taken in the petition and with the order granting certiorari, the Brief for the Petitioner invoked no Constitutional provision and made no mention of the Constitution. The Brief for the United States, however, which was filed in response to the petitioner's brief on the merits, has injected the Constitution of the United States into these proceedings, directly on pages 4, 7 and 13 of the said brief and indirectly elsewhere in said brief. These casual injections of Constitu-

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[3] "The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted, limited to the questions raised in the case with respect to Rule 32(c)(1) of the Federal Rules of Criminal Procedure and the case is placed on the summary calendar" (Appendix, p. 10).

[4] "It is the Petitioner's position that the foregoing presentation demonstrates that not only does the question herein involve a conflict between circuits, it also involves a question of manifest social importance and a further question as to whether the supervisory powers of this Court should be invoked for the purpose of eliminating the practice of conducting pre-sentence investigations prior to conviction without the consent of the accused" (Petition, p. 8).

tion considerations by the United States have been exploited by the United States as a basis for injecting harmless-vs-prejudicial-error considerations from a substantive standpoint. Such considerations are alien to this case as it was presented to and accepted by this Court.

The Brief for the United States proceeds to urge harmless error on the numerous grounds which are quoted in the footnote.[4] The government's presentation on harmless error would be conclusive, if relevant and it would be relevant if the question before the Court were a Constitutional question; but the question before the Court is not

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[4] The following quoted statements urging harmless error appear on the following pages of the Brief for the United States:

a. "We find no ruling or statement by the judge which could have apprised the jury either of any pre-judgment he may have made on that question, or of any information contained in the report" (p. 6).

b. "Even assuming that the effects of which petitioner complains might in some cases constitute 'manifest injustice,' they plainly did not do so in petitioner's case" (p. 7).

c. "Even assuming that the effects of which petitioner complains might in some cases constitute 'manifest injustice,' they plainly did not do so in petitioner's case" (p. 7).

d. "That being so, the presumption is that the trial judge discharged his official responsibility properly and did not violate the rule" (pp. 9, 10).

e. "In the government's view, an order setting aside the conviction for new trial would be a suitable remedy only if prejudice to the jury's determination of guilt or innocence appeared or must be presumed on this record" (p. 11).

f. "Petitioner does not suggest how the jury might have learned of or been influenced by the judge's views. Moreover, there is no reasonable basis for believing that premature reading of the pre-sentence report in this case could have influenced the judge's views beyond what was properly communicated to him in the psychiatric report" (p. 13).

g. "It is unbelievable under the circumstances that petitioner's sentence was affected by the fact of a pre-conviction pre-sentence investigation" (p. 15).

a Constitutional question and the government's said presentation is not relevant. An appropriate example showing the government's approach is the Solicitor General's assertion at page 13 of the Brief for the United States that "there is no reasonable basis for believing that premature reading of the presentence report in this case could have influenced the judge's views." This statement says nothing and, at the same time, says too much[5] and it entirely begs the question which is the foundation of this appeal, that is, the question posed by Justice Clark and two concurring Justices in his separate opinion in *Smith* v. *United States*, 360 U.S. 1.[6]

Judges presumably are above being influenced by improper, extraneous matter and the proposition that a judge's rulings on the admissibility of evidence and on trial procedures could be affected by a loathing or a liking

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[5] The quoted statement says "too much" because it and similar observations in the Brief for the United States effectively demonstrate that the Solicitor General's "harmless error" argument would be equally applicable to almost every conceivable case, however deliberate and substantial the violation of Rule 32(c)(1) might be. It is necessary for the mind to construe a ridiculous hypothetical where a trial judge not only read the pre-sentence report during trial but regaled the jury with some of its more interesting highlights in order to imagine a situation where the record would reflect a probability that the jury's verdict was affected by the premature reading. The Solicitor General's argument on this point would render it permissible to violate the rule in all jury cases and, in this respect, the argument says "nothing" because it speaks of "Harmless error" in a context where there is no counterpart.

[6] At 360 U.S. 17, Justice Clark disclaimed substantive considerations stating: "I do not reach the due process contention for it appears to me that our duty of supervision over the administration of justice in the federal courts requires reversal because of this interview. In a criminal case, such a private conference must be deemed presumptively prejudicial where, in violation of Fed. Rules Crim. Proc. 32(c)(1) it was conducted prior to the plea.

for an accused because of what he has read or heard about him is the type of proposition that only a pre-law student would consider interesting or pertinent to a consideration of what rules of criminal procedure should be implemented and enforced. The task of ruling on objections and other matters which arise at a trial is tedious work, interesting only in an academic sense and hardly susceptible to emotional influences. Certainly, Justice Clark and the two concurring members of the Court were not concerned with protecting judges from undue influence in the same manner that jurors must be protected when they rendered their opinion in *Smith* v. *United States, supra.*

What is at issue here is not the question of prejudice to the petitioner's opportunity to be found not guilty at his trial or prejudice to his hopes for probation or prejudice to any of his substantive rights or privileges. What is at issue on the question of prejudice, is that of prejudice to the federal system of criminal justice. The question is that of whether the conduct of the trial judge and local probation office in this case (as such conduct was found and determined by the Sixth Circuit[1]) constituted such a

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[1] The Brief for the United States contains a substantial amount of testimony of alleged facts being injected into this appeal for the first time and relating to the question of whether the trial judge actually read the pre-sentence report before the jury returned with its verdict. In the direct appeal of this cause the Sixth Circuit found "the facts that the District Judge had seen the pre-sentence investigation report prior to the time when the jury returned its verdict" (Appendix, p. 10). Upon that finding the Sixth Circuit entered the ruling which the Petition for Certiorari herein asserted was in conflict with the law in the Seventh Circuit. The Solicitor General's efforts to have the appellate finding of the Sixth Circuit set aside beg the question entirely because the Sixth Circuit's questioned interpretation of Rule 32(c)(1) would remain in effect and in conflict with the interpretation of the Seventh Circuit.

procedural irregularity as to require an exercise of the supervisory powers of this Court in the enforcement of Rule 32(c)(1) of the Federal Rules of Criminal Procedure.

The F.B.I. Agent who talked to the judge in chambers in the *Smith* case prior to Smith's plea of guilty was given an inside track and both the agent and the Assistant U.S. Attorney who arranged the conference and their fellow government agents and attorneys were caused to have a misconception as to their proper relationship with the courts by the trial court's conduct in that case and, undoubtedly, the appellant, Smith, had the most serious misgivings and feelings of being wronged when the fact of the premature conference was revealed on the record after Smith had entered a plea of guilty and thrown himself on the mercy of the court. The damage to the trial court and the federal system of criminal justice in that case was considerable. In the present case the facts were different but the overall effect was the same. The petitioner, immediately after his trial, learned that the judge already had read a necessarily one-sided investigation of him which he had refused to consent to[*] and which he naturally assumed had not taken place. The tender of the consent form to the petitioner when his permission was sought had been a fraud because it constituted a representation that there would be no pre-trial probation investigation unless the form were executed. The trial judge, pursuant to Rule 32(a) of the Federal Rules of Criminal Procedure, invited the petitioner to say anything he wished to say in

[*] On page 19 of the Brief for the United States there is the following statement: "As we understand petitioner's consent was sought in this case." This statement corresponds with counsel for the petitioner's recollection of the matter, that consent was sought and refused.

his own behalf without indicating that there was anything known to the court which had not been presented formally in the record. It was only after the petitioner had spoken that the trial court revealed that the pre-sentence investigation which the petitioner had refused to consent to had been completed and read by the court and the trial court went directly from that revelation to sentencing without any further questions to the petitioner. The petitioner's situation was that of being asked to speak in his own behalf in response to the trial and conviction which had just taken place (and at which he had not testified and his record had not been revealed) and then being informed that the questioner had in his possession the adversary party's trump card, an unconsented to report of an investigation in which the government's agents had been interviewed but not the petitioner and which contained allegations the petitioner never had an opportunity to explain. The situation was inherently unfair.

Numerous arguments are advanced by the United States which urge that nothing more than a remand for a hearing and re-sentencing is needed in this case because it should be presumed that judges and probation workers will perform their respective roles correctly without any re-structuring of the system by this Court in the exercise of its supervisory powers and without the granting of a new trial because of the violation of Rule 32(c)(1).* An

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*Such guidelines should contain a flat ruling that pre-arraignment pre-sentence investigations are not to take place without the intelligent consent of the accused. Counsel for the petitioner do not dispute the Solicitor General's claim that pre-sentence investigations very frequently are undertaken before arraignment where consent is refused and that representation is hereby accepted as a fact to be considered as such by this Court. Counsel for the petitioner do not believe that the frequency of this type of violation

incident which has taken place in the course of this appeal demonstrates that the Solicitor General's position is ill-taken. On January 21, 1969 the Solicitor General wrote to the Chief Probation Officer of the trial court (see Appendix A) and requested him to send a copy of the petitioner's probation report to the Clerk of this Court (presumably by mail and therefore presumably under seal). The petitioner had no objection to this and still has none.

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of Rule 32(c)(1) vests the practice with legality. The practice clearly does violate the following provision in the rule: "The probation service of the court shall make a pre-sentence investigation and report to the court before the imposition of sentence or the granting of probation unless the court otherwise directs." The words "otherwise directs" inescapably imply that it was contemplated by the rule that the cause would be before the district court before the investigation would be initiated because if it were not before the district court the court would be in no position to "otherwise direct." The federal probation literature which has been cited by both parties in this action shows that these early pre-sentence investigations are initiated at the time of the commissioner's hearing (see Brief for the Petitioner, p. 13). Where consent is obtained the investigation is launched by an agreement which is in no way contrary to the public policy embodied in Rule 32(c)(1) but where the early pre-sentence investigation is launched without consent, over objection, before arraignment, before indictment, and even before probable cause is found (in cases where the probable cause hearing is continued and this frequently happens where probable cause isn't waived) the violation of the clear provisions of the rule is manifest. Apart from the fact that the complained of practice violates the rule, petitioner's counsel believe that the following practical considerations require a firm mandate that no pre-arraignment probation investigations take place without consent. (1) The literature in the field is unanimous in reporting that such investigations are harmful and invalid because the interview of the accused is an essential cornerstone to a valid inquiry. (2) A premature investigation of an impoverished, lower-class accused who intends to fight the charges against him would have an intimidating effect upon the family, friends and potential character witnesses who would be interviewed and whom the accused must call upon for support (assuming that they are of his same lower economic class). (3) A premature investigation of an individual accused of a white collar crime could have a very severe effect upon him socially and economically.

Then, concurrent with the receipt of the Brief for the United States, petitioner's counsel learned through another letter (see Appendix B) that the said chief probation officer for the trial court sent the report instead to the office of government counsel and at government counsel's behest it now is in the office of the Clerk of this Court and open to the inspection of all counsel on the case without any court order having been issued. Rule 32(c)(2) of the Federal Rules of Criminal Procedure very clearly provides against such disclosure of a pre-sentence report:

> The court before imposing sentence *may* disclose to the defendant or his counsel all or part of the material contained in the report of the pre-sentence investigation and afford an opportunity to the defendant or his counsel to comment thereon. Any material disclosed to the defendant or his counsel shall also be disclosed to the attorney for the government.

If the above-quoted portion of Rule 32(c)(2) is to be given an interpretation that is at all consistent with its plain meaning it necessarily follows that the rule has been breached severely during the appeal in this cause. Under these circumstances it is difficult to accept the Solicitor General's suggestion that the substantive harmless-error rule should prevail with respect to Rule 32(c) because it should be presumed that probation officers and trial judges will do their jobs properly. Carried to their logical conclusion, such presumptions would justify the elimination of the appellate process. With respect to this case and the issues herein, it should be sufficient to note that a shambles has been made of Rule 32(c) by actions occurring even at the highest administrative level. A disposi-

tion of this cause without the ordering of a new trial would be a toothless gesture leaving Rule 32(c) with merely an advisory force and effect. The rule itself has been ignored frequently and unless the decision in this cause contains clear and unmistakable guidelines and an order setting aside the conviction, it could not be expected to have any more effect than the provisions of Rule 32(c) have had.

WHEREFORE, petitioner renews the prayer for relief made in the conclusion of his brief on the merits.

DEAN E. RICHARDS
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Attorneys for Petitioner

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PALMER K. WARD

APPENDIX A

[EMBLEM]

OFFICE OF THE SOLICITOR GENERAL
Washington, D.C. 20530

January 21, 1969

Mr. Frank Saunders
Chief Probation Officer
Western District of Kentucky
Federal Building
Louisville, Kentucky 40202

Re: United States v. John McMillan Gregg
Criminal Action No. 26,745 (W.D.Ky.)

Dear Mr. Saunders:

The above case is being reviewed by the United States Supreme Court on writ of certiorari. The central issue centers on a presentence investigation report which your office prepared. In reviewing this case, the Supreme Court may wish to examine the contents of this report. Would you kindly send a copy of the report to the Clerk of the Supreme Court so that it will be available for examination by the Justices of the Supreme Court.

Sincerely,

ERWIN N. GRISWOLD,
Solicitor General.

cc: Mr. Dean E. Richards
156 East Market Street
Indianapolis, Indiana 46204

APPENDIX B

[EMBLEM]

OFFICE OF THE SOLICITOR GENERAL
Washington, D.C. 20530

February 7, 1969

Honorable John F. Davis
Clerk
United States Supreme Court
Washington, D. C. 20543

Dear Mr. Davis:

Re: John McMillan Gregg v. United States, No. 453, this Term

Lodged herewith is the presentence record made regarding petitioner in the abeve case. We had requested that the report be sent directly to you so that the Justices might if they wished consult it in connection with their consideration of this case. As the report has been sent instead to our office, we believe it should now be placed with the record and made available to counsel for petitioner before hearing of the case.

Sincerely,

Erwin N. Griswold
Solicitor General

cc:
Dean E. Richards, Esq.
155 Market Street
Indianapolis, Indiana 46204